

SUPREME COURT OF ARKANSAS

No. CR 11-431

JOE MOORE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered June 16, 2011

PRO SE MOTION FOR
TRANSCRIPT [MILLER COUNTY
CIRCUIT COURT, CR 2009-276,
HON. KIRK D. JOHNSON, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2009, appellant Joe Moore was found guilty by a jury of the aggravated robbery of a clerk at an amusement arcade. He was sentenced to 600 months' imprisonment. The Arkansas Court of Appeals affirmed. *Moore v. State*, 2010 Ark. App. 771.

Subsequently, appellant timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). The petition was denied. Appellant lodged an appeal here and now seeks by pro se motion a copy of the transcript of his trial.

We need not address the merits of the motion because it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward. Accordingly, the appeal is dismissed, and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the

appellant could not prevail. *Lewis v. State*, 2011 Ark. 176 (per curiam); *Kelley v. State*, 2011 Ark. 175 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Kelley*, 2011 Ark. 175; *Ewells v. State*, 2010 Ark. 407 (per curiam) (citing *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam)). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Watkins*, 2010 Ark. 156, 362 S.W.3d 910; *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918.

In his petition, petitioner contended that his attorney was ineffective in that he failed to do the following: argue that the state's expert witnesses did not prove that he committed a crime; make the jury aware of the factual circumstances surrounding his arrest that would have shown that he was never in the arcade where the robbery occurred; object to false testimony given by the State's witnesses. He also contended that he was denied effective assistance of counsel on appeal because the brief counsel filed on appeal was insufficient.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the sole question presented is whether, based on a totality of the

evidence, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Ewells*, 2010 Ark. 407, at 2. Under the two-pronged *Strickland* test, a petitioner raising a claim of ineffective assistance must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *Smith v. State*, 2010 Ark. 137, at 2-3, 361 S.W.3d 840, 844. There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and an appellant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel, which, when viewed from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam).

With respect to the second prong of *Strickland*, the claimant must demonstrate that counsel's deficient performance prejudiced his defense to such an extent that the petitioner was deprived of a fair trial. *See id.* Such a showing requires that the petitioner demonstrate a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Ewells*, 2010 Ark. 407, at 3. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Appellant did not provide enough factual substantiation for any of his claims to establish that counsel's conduct specifically prejudiced the defense. He did not explain what

evidence counsel could have used to establish that he was not in the arcade when it was robbed, what false testimony was given by a particular witness, and what information was available through which counsel could have challenged a particular witness, or what specific meritorious arguments counsel could have raised on appeal. Conclusory statements without factual substantiation are insufficient to overcome the presumption that counsel was effective and do not warrant granting postconviction relief. *Kelley*, 2011 Ark. 175; *Delamar v. State*, 2011 Ark. 87; *Eastin v. State*, 2010 Ark. 275; *Watkins*, 2010 Ark. 156, 362 S.W.3d 910.

With respect to appellant's claim that his appellate attorney was ineffective, convicted defendants have the right to effective assistance of counsel on appeal in accordance with the Sixth Amendment. *Howard v. State*, 291 Ark. 633, 727 S.W.2d 830 (1987). The petitioner claiming that counsel was ineffective on appeal bears the burden of making a clear showing that counsel failed to raise some meritorious issue. *Id.* Petitioner has not met that burden in that he fails to state what specific meritorious argument could have been advanced on appeal. An attorney need not advance every argument, regardless of merit, urged by his client. *Id.*; *Jones v. Barnes*, 463 U.S. 745 (1983); *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

In addition to allegations of ineffective assistance of counsel, appellant also raised a number of conclusory claims of deprivation of constitutional rights. In no instance did he offer facts from which it could be determined that a violation of a right occurred and failed to cite any authority. A court need not consider an argument, even a constitutional one, when a

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claimant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Watkins*, 2010 Ark. 156, 362 S.W.3d 910 (citing *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003)).

The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *Mitchem v. State*, 2011 Ark. 148. A court is not required to research or develop arguments contained in a petition for postconviction relief. *See Eastin*, 2010 Ark. 275; *see also Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam). Appellant here did not meet his burden of establishing that counsel was ineffective under the *Strickland* standard or otherwise show that he was entitled to postconviction relief under Rule 37.1.

Appeal dismissed; motion moot.